



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: S&S Contractors
File: B-231719
Date: December 29, 1988

DIGEST

The Army Corps of Engineers may distribute contract retainage to unpaid subcontractors if both the subcontractors and the primary contractor agree to an indemnity agreement which warrants that there are no other creditors and which calls for immediate repayment of contract retainage to the Government upon discovery of others who may have equitable claims. This approach satisfies the requirement that the rights of all parties be adequately determined prior to payment from any contract retainage.

DECISION

This decision responds to a request for review of a proposed payment agreement regarding disbursement of contract retainage to two subcontractors of S&S General Contractors (S&S). For the reasons set forth below, the retainage may be disbursed as proposed.

BACKGROUND

Contract No. DACW56-86-C-0030 was entered between the Army Corps of Engineers and S&S General Contractors for rehabilitation of a sanitary sewer system. The performance and payment bonds provided by S&S General Contractors were, unbeknownst to S&S, counterfeit. By the time the bonds were discovered to be forged, the project had been 95 percent completed, and S&S was unable to secure new bonding. It is our understanding that S&S completed the contract but is now unable to pay the suppliers that furnished materials for the performance of the contract. The two known subcontractors, Pangborn Stottlemire Inc. (Pangborn), and Staff Industries, Inc. (Staff), are owed \$3,418.00 and \$10,639.62, respectively, from the contractor. The Corp of Engineers still owes \$14,000 for the project to S&S General Contractors, which it has withheld as retainage.

044250/13766/

ANALYSIS

Generally, because there is an absence of privity of contract between subcontractors and the government, an unpaid laborer's or materialman's remedy lies against the prime contractor and not the Government. H. Herfurth, Jr., Inc. v. United States, 89 Ct. Cl. 122 (1939); 57 Comp. Gen. 176, 177 (1977).

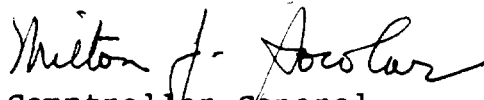
However, our Office and the courts have recognized that subcontractors and suppliers may have equitable claims to the contract retainage the Government has not yet paid to contractors. 57 Comp. Gen. at 178; Kennedy Electric Co., Inc. v. United States Postal Service, 508 F. 2d 954, 960 (1974). In 57 Comp. Gen. 176, although we recognized the existence of an equitable claim by the subcontractor, a possibility existed that not all the subcontractors were known. Thus, in order to protect the Government's interests, we recommended that steps be taken to assure that the rights of all parties were adequately determined prior to any payment from the contract retainage.

In the instant case the Army has prepared indemnity agreements for S&S and Staff and S&S and Pangborn, which they have executed. The agreements result in a prorated distribution of the unpaid contract balance held as retainage. Moreover, under the indemnity agreements S&S warrants that the only unpaid debts for supplies furnished or services performed in connection with the contract are owed to Staff and Pangborn. The agreements further provide that S&S and Staff^{1/} and S&S and Pangborn jointly and severally agree to immediately repay to the Government the prorated retainage moneys upon being notified of any other valid claims made regarding the furnishing of labor or materials in connection with the work provided for in the contract.

The indemnity agreements, as written and signed by S&S, Staff, and Pangborn reasonably appear to satisfy the requirements set out in 57 Comp. Gen. 176, 178, assuring that the rights of all parties are adequately determined prior to payment from contract retainage. Therefore, GAO

^{1/} Staff filed a claim against the Government on several legal grounds. Staff has informed the Army that it will withdraw all claims against the United States as soon as the agreed upon payment in the indemnity agreement is paid.

does not object to the joint payment of the contract retainage to the subcontractors and primary contractor in this instance.

for 
Comptroller General
of the United States